Supreme Court, U. S.
FILED
SEP 14 1976
MICHAEL RODAK, JR., CLERK

No. 76-377

In the Supreme Court of the United States

OCTOBER TERM, 1976

MICHAEL LEOPOLD PEPLINSKI,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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Petitioner,

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STATE OF NORTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, Michael Leopold Peplinski, prays that a writ of certiorari issue to review the opinion of the Supreme Court of North Carolina.

OPINION BELOW

The opinion of the Supreme Court of North Carolina affirming petitioner's conviction of first degree murder

and sentence of death by lethal gas is reported at ..... N.C. ....., 225 S.E. 2d 568 (1976). [1, 2, 3]

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. 1257 (3) (1970), the petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of North Carolina was entered on June 19, 1976. The petition for writ of certiorari was filed on September ....., 1976.

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was deprived of his constitutional right to a fair trial by the cumulative prejudicial effect of prosecution misconduct amounting to plain error of constitutional magnitude, where the prosecutor, in the presence of the jury:

(A) Improperly elicited from his own witness testimony that petitioner's alleged accomplice (deceased at the time of trial) was an "escaped felon" during the commission of the alleged murder and had been in the "North Carolina prison system".

[1] Subsequently, the North Carolina mandatory death sentence statute, pursuant to which petitioner was convicted and sentenced, was held violative of the Eighth and Fourteenth Amendments to the United States Constitution, *Woodson* v. *North Carolina*, 75-5491.

[2] Rule 31 (g) of the New North Carolina Rules of Appellate Procedures provide that courts will not entertain petitions for rehearing in criminal cases.

[3] An administrative order was entered in the Superior Court—Robeson County, North Carolina on September 7, 1976 resentencing petitioner to life imprisonment.

(B) Repeatedly cross-examined and discredited a State's witness (co-defendant who was not tried with petitioner), thereby prejudicing petitioner.

(C) In his final argument to the jury, he alluded repeatedly to the fact that petitioner put on no defense or evidence in his own behalf. He also improperly argued "that the guilty fleeith where no one pursueth".

2. Whether petitioner was denied effective assistance of counsel in his appeal to the Supreme Court of North Carolina, where such appointed counsel omitted to raise on appeal deprivation of constitutional rights which occurred during the trial.

3. Whether the utilization of a Baptist Church for trial imposed such physical limitations of courtroom facilities as to deprive petitioner of an opportunity for a constitutional jury determination of his guilt or innocence, where the jury was not sequestered?[4]

4. Whether petitioner was denied procedural due process by the prejudicial effect of certain prosecution evidence amounting to plain error of constitutional magnitude, where, in the presence of the jury:

(A) A prosecution crime laboratory technician speculatively testified as to the manner and of his personal observations of test firings of the death weapon into clothing worn by the deceased.

(B) The prosecution was permitted to place into evidence a shotgun, shotgun shells and handcuffs which were taken by the police from a compartment behind the back seat of the station wagon allegedly used in the commission of the offense by the petitioner and his accomplices; the receipt into evidence of gloves,

[4] Affidavit of trial counsel App. 18.

wallet and petitioner's business cards which were found on the body of petitioner's deceased alleged accomplice at the scene of the occurrence?

(C) The prosecution was permitted to elicit from the deceased victim's widow opinion testimony that it was common knowledge her husband carried $6,000 or $7,000 on his person at all times.

(D) Prosecution witness, Deputy Hubert Stone, was improperly permitted to read the confession of petitioner's accomplice (Locklear—who testified as a prosecution witness during the trial). Such confession strongly implicated petitioner, and the manner of its presentation was highly prejudicial.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, that:

> "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

> "Section 1. . . . nor shall any State deprive any person of life, liberty or property without due process of law; . . ."

STATEMENT OF THE CASE

Petitioner, Michael Leopold Peplinski, was tried to a jury in Robeson County, Superior Court, North Carolina, upon an indictment charging him with murder in the first degree. The State proceeded on the theory that the alleged murder was committed while petitioner, Larry Clark and David Earl Locklear were attempting to rob Hudler Hunt, who was shot and killed in the occurrence.

Petitioner offered no evidence in his defense. The State's evidence-in-chief tended to show that on January 18, 1975 petitioner owned two Bars in Fayetteville, North Carolina (R. 26) and on that date a locksmith, summoned by an employee of petitioner, made a key for a 1973 yellow station wagon bearing Florida license plates. (R. 19-20) Said employee, whose name was Doris Peplinski, drove the station wagon to a house which she shared with petitioner and, upon her arrival petitioner, David Locklear and Larry Clark were together. (R. 21-22) She gave the key to petitioner, and left with Tina Aprile. The two women returned to the house after lunch and observed that the three men and the station wagon were gone. (R. 22-24) On the following morning, after Doris telephoned petitioner, the two women drove to Bennettsville, South Carolina, where they joined Peplinski, Locklear and Clark in a restaurant. All five spent that night in a motel in Bennettsville and, on the following morning, January 20, 1975, petitioner asked the girls to reserve the room for the men for another night. The yellow station wagon remained with the men. (R. 22-24)

Petitioner's alleged accomplice, David Locklear, testiefid that he, petitioner, and Larry Clark returned to North Carolina on January 20, 1975, so that Clark could collect a debt from Hudler Hunt. Upon arriving at the Hunt home at about 6:30 P.M., Locklear remained in the station wagon while petitioner and Clark went to the house. Locklear heard shots being fired and he saw petitioner and Clark run for the station wagon. Locklear attempted to back the station wagon up, but he ran into a ditch and became stuck. He ran into nearby woods, where he was arrested the following afternoon by the police. (R. 29-31)

Mrs. Hunt testified that she and her husband were watching TV on January 20, 1975 at about 6:30 P.M. when the doorbell rang. Upon going to the door she observed petitioner and an Indian. (R. 79-80) She did not open the

door but she returned to the den, whereupon her husband picked up a weapon and went outside. Petitioner came into the den and requested that he be permitted to use the telephone, explaining that he was a chain gang guard, and he needed help because an inmate in his custody had escaped at David Miller's station. She became suspicious and left the den because she knew that there was a telephone at David Miller's station. When she left the porch, petitioner came up behind her and sprayed her with tear gas. She pulled her shirt up over her head, and heard petitioner ask the Indian, "have you got his pocketbook?" Petitioner then began spraying tear gas toward her husband, and at that time both her husband and the Indian began to shoot. She saw her husband fall. Petitioner left the porch and asked the Indian, "did you get it?" The Indian replied, "no, let's get the hell out of here, I am hit". She returned to the house, obtained her rifle and fired it toward the men sixteen times. She then called a neighbor to help move her husband's body. (R. 82)

Deputy Sheriff, Hubert Stone, testified that on January 20, 1975, he and other officers responded to a call and when they arrived at Hudler Hunt's home, he observed that Hudler Hunt was dead. He observed the Indian, Larry Clark, dead in a nearby hog pen, a .32-20 seven shot revolver, containing seven empty hulls in the dead man's hand. He also saw a 1973 Chevrolet station wagon near the Hunt yard, stuck in a ditch, the engine running and headlights were on. He observed blood on the outside and inside of the station wagon, and he further noted a small hole, about the size of a .22 bullet hole, about half way up the top of the car. That Locklear was arrested nearby in a swamp the next day, and petitioner was arrested in a wooded area about one-quarter mile from the Hunt home on January 22, 1975. Petitioner had three bullet wounds in his body. (R. 90-114)

Dr. Thompson, a pathologist, testified that his examination of the body of Hunt, on January 21, 1975, disclosed four bullet wounds in the body, and in his opinion, Hunt died of multiple gunshot wounds. (R. 99-100)

A firearms expert testified that the bullets removed from Hunt's body were fired from the revolver found in Larry Clark's hand, and after examining a brown workshirt and Tee shirt taken from Hunt's body, powder burns on the two shirts resulted from bullets making burns at extremely close range. (R. 123-133)

HOW CONSTITUTIONAL QUESTIONS WERE PRESENTED AND DECIDED BELOW

Petitioner's appeal included assignments of error that his trial and the sentence of death imposed contravened the Eighth and Fourteenth Amendments to the United States Constitution. The North Carolina Supreme Court succinctly rejected petitioner's claims. *State* v. *Peplinski*, ... N.C. ....., 225, S.E. 2d 568 (1976).

REASONS FOR GRANTING THE WRIT

Although this Court has ruled that the mandatory death sentence statute involved here violates the Eighth and Fourteenth Amendments to the Constitution, there are numerous additional errors of constitutional magnitude which affected petitioner's right to a fair trial.

We submit the following reasons for granting the Writ:

1. The prosecutor's tactics throughout flouted traditional concepts of justice and fairness, thereby effectively denying a fair jury consideration.

The Court below conceded that error intervened by significantly emphasizing prosecutor misconduct in its Opinion (App. 17). Although generally this Court will not review rulings on evidence in State proceedings, it has admonished that States are not completely unfettered in such matters. Minimum standards of procedural due process must be adhered to. *Lisenba* v. *California,* 314 U.S. 219 (1941). Prosecutor misconduct resulting in a denial of due process has been condemned. *Berger* v. *United States,* 295 U.S. 78 (1934).

In *Michelson* v. *United States,* 335 U.S. 469 (1948), this Court acknowledged the need for fundamental concepts of fairness, at (pp. 475-476):

> "Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt . . . The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

In the case at bar, prosecution testimony that petitioner consorted with an escaped felon (his alleged accomplice); and repeated attempts by the prosecutor to impeach his own witness (also petitioner's alleged accomplice) nullified petitioner's right to a jury determination according to the law of the land.

Failure of a defendant to testify or to put on a defense can never be the thrust of the prosecution's case. *Griffin* v. *California,* 380 U.S. 609 (1965). See *Stewart* v. *United States,* 366 U.S. 2 (1960).

The prosecutor's argument "that the guilty fleeith where no one pursueth" was likewise prejudicial. *Hickory* v. *United States,* 160 U.S. 408 (1895). The conviction here was procured by tactics which have been condemned by this Court. *Wilson* v. *United States,* 149 U.S. 60 (1892).

Compounding other prosecutorial misconduct, the prosecutor put the imprimatur of his office in impressing the jury repeatedly that petitioner did not testify or put on a defense when he argued:

> ". . . every scintilla of evidence adduced in this courtroom, in this lawsuit, was put on by the State of North Carolina. Every bit of it." (TR 328)
>
> "You see, the way the case has developed, the State presenting all the evidence in this case, I find myself in a position of being sandwiched on the arguments double teamed." (TR 329)

"I guess that—well, this lawsuit, even though the State has presented every bit of the evidence in it, this lawsuit is just like 99 per cent of all criminal lawsuits, it boils down to one proposition: Who do you believe? Do you believe the State's witnesses in this case?" (TR 338)

"Well, that's the case. That's the State's case. That's all the evidence there is in this case." (TR 361)

PLAIN ERROR

Considering the demonstration of the multiplicity of the prosecutor's prejudicial conduct throughout every phase of the trial and in his viciously unfair closing argument, it is the respondent's burden to demonstrate that the errors are harmless "beyond all reasonable doubt." *Chapman* v. *California,* 386 U.S. 18. *Chapman* made explicit that "an error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be concluded as harmless . . . . Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 23-24. The all pervasive misconduct of the prosecutor, we submit, was not "harmless beyond a reasonable doubt."

The repeated misconduct of the prosecutor rendered the trial a farce, with conviction a foregone conclusion. The jury was misled and necessarily disabled from rendering a fair and dispassionate verdict.

2. Petitioner was denied the effective assistance of counsel in his appeal to the Court below.

The inadequacy of petitioner's appointed counsel on appeal deprived him of a fair and complete review of his conviction. Inexplicably, appointed counsel omitted to

present for review the pivotal issues of: the constitutional shortcomings of the courtroom, a Baptist Church; the prejudicial reading by a prosecution witness of Locklear's confession strongly implicating petitioner; the considerable inflammatory and improper evidence regarding the death weapon and clothing worn by the deceased.

Failure to afford effective assistance of counsel for an indigent defendant charged with a felony has been held to be violative of the due process clause of the Fourteenth Amendment. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Glasser* v. *United States,* 315 U.S. 60 (1941); *Anders* v. *California,* 386 U.S. 738 (1967) and *Entsminger* v. *Iowa,* 386 U.S. 748 (1967); also *Powell* v. *Alabama,* 287 U.S. 45 (1932). Sixth Amendment to the United States Constitution. Fourteenth Amendment to the United States Constitution.

3. Utilization of a Baptist Church as the courtroom created an atmosphere which amounted to a denial of a constitutional forum.

This Court stated in *Turner* v. *Louisiana,* 379 U.S. 466 (1964) at p. 472:

"The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. 'The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law."

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom. . . ."

The highly unusual physical characteristics of the courtroom, jury room and appurtenant facilities for trial were constitutionally inadequate and denied petitioner a fair jury trial. Although the jury was not sequestered and was from time to time removed to the so-called jury room, the close proximity of the jury to the courtroom at all times, the absence of sound barrier protection in the jury room to insulate the jury from prejudicial proceedings, resulted in a substantial deprivation of procedural due process. Thus, when the jury was removed to the jury room (ostensibly out of earshot) during the reading of Locklear's confession, strongly implicating petitioner, the proceedings became so prejudicial that the trial judge was constrained to admonish, "keep your voice down", "these walls are paper thin" (TR 69). Petitioner was intolerably burdened with the task of meeting the effect of such confession.

4. Petitioner's right to a constitutional jury determination was substantially abridged by the cumulative effect of certain improperly admitted evidence.

Inflammatory and speculative opinion evidence was introduced and argued to the jury relating to laboratory experiments concerning the death weapon and clothing worn by the deceased. Nothing probative was adduced but it served solely to mislead and inflame the jury. (TR 285-311)

Weapons and handcuffs which were not relevant to any issue in the case, and their connection with petitioner was never proved, were introduced into evidence. Also, gloves, a wallet and petitioner's business cards, taken from the body of deceased Larry Clark, were improperly admitted into evidence.

In his zeal to prejudice the jury, the prosecutor improperly elicited from the deceased victim's widow that it was common knowledge he usually carried $6,000.00 or $7,000.00 on his person at all times.

The prosecutor took full advantage of the awesome powers of his office and inflamed the jury with prejudicial evidence obtained from and applicable solely to petitioner's accomplices, Clark and Locklear, notwithstanding that petitioner was tried alone. *Bruton* v. *United States,* 391 U.S. 130 (1967).

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Appeal by defendant from Godwin, J., June 1975 Session of Robeson Superior Court.

The State's evidence, in substance, tended to show that on 18 January 1975 a locksmith in Fayetteville, North Carolina, made a key for a 1973 yellow station wagon bearing Florida license plates. The key was received by an employee of defendant who delivered it to a woman identified as Doris Peplinski. Doris Peplinski drove the station wagon to a house which she shared with defendant and upon arrival, she found defendant Peplinski, David Locklear and Larry Clark in the house. She gave the keys to defendant and left with Tina Aprile who had come to the house in Doris's automobile. After lunch, the two women returned to the house and found that the three men and the yellow station wagon were gone. On the following morning, after Doris had telephoned defendant, the two women drove to Bennettsville, South Carolina, where they joined Peplinski, Locklear and Clark at a restaurant. They all spent the night in a motel room in Bennettsville and afterwards Doris Peplinski, at the request of defendant, reserved the room for an additional night. The two women returned to Fayetteville leaving the station wagon with the men.

David Locklear testified that he, Larry Clark and Peplinski returned to North Carolina on 20 January 1975 so that Clark could collect a debt from Hudler Hunt who lived near Rowland, North Carolina. Upon arriving at the Hunt home at about 6:30 p.m., he remained in the station wagon while the other two men went to the Hunt dwelling. He then heard shots and saw Clark and Peplinski run toward the car. He tried to back the station

wagon up but ran into a ditch. He was frightened and fled into the woods where he remained until his arrest on the following day at about 3:00 p.m.

Mrs. Hudler Hunt testified that she and her husband were watching T.V. at about 6:30 p.m. on 20 January 1975 when she heard the doorbell ring. Upon going to the door, she observed a white man and an Indian. At this point, defense counsel objected and Judge Godwin, after conducting a *voir dire* hearing concerning the admissibility of identification evidence, ruled the evidence to be admissible. When the jury returned, Mrs. Hunt identified defendant as the white man who came to her home on 20 January 1975. She stated that upon observing these men, she did not open the door but returned to the den. Her husband then picked up a weapon and went outside. Defendant Peplinski came into the den and said that he wanted to use the telephone. He explained that he was a chain gang guard and that he needed to get help because an inmate in his custody had escaped at David Miller's station. She became suspicious and left the den because she knew there was a telephone at David Miller's station. Upon reaching the porch, defendant came up behind her and sprayed her with tear gas. She pulled her shirt up over her head and at that time heard the defendant ask the Indian, "Have you got his pocketbook?" Defendant then began spraying the tear gas toward her husband and at that time. both her husband and the Indian began to shoot. She saw her husband fall. Defendant left the porch and asked the Indian, "Did you get it?" The Indian replied, "No, let's get the hell out of here, I'm hit." She returned to the house, obtained her rifle and fired it toward the men sixteen times. She then called a neighbor to help her move her husband's body.

Deputy Sheriff Hubert Stone testified that he and other officers went to the Hudler Hunt home on 20 January in response to a call. Officer Stone observed that Mr. Hudler Hunt was dead. He then found the dead body of an Indian man, later identified as Larry Clark, in a nearby hogpen. A .32-20 seven-shot revolver containing seven "empty hulls" was found in the dead man's hand. He also found a 1973 Chevrolet station wagon near the Hunt yard with one of its rear wheels in a ditch. The engine was running and the headlights were on. He observed blood on the outside and inside of the station wagon and he further noted a small hole about the size of a .22 bullet hole "about halfway of the top of the car." He related that David Earl Locklear was apprehended in a nearby swamp at about 3:00 p.m. on the next day and that defendant Peplinski was found and arrested in a wooded area about a quarter of a mile from the Hunt home on Wednesday, 22 January 1975. Peplinski had three bullet wounds in his body.

Dr. Marvin Thompson, an expert in pathology, testified that he examined the body of Hudler Hunt on 21 January and found four bullet wounds in the body. He removed two bullets from the body and stated that in his opinion, Hudler Hunt died as a result of multiple gunshot wounds "with subsequent hemorrhage."

An S.B.I. firearms expert testified that in his opinion, the bullets removed from Mr. Hunt's body were fired from the revolver found in Larry Clark's hand.

Defendant offered no evidence.

The jury returned a verdict of guilty of murder in the first degree and defendant appealed from judgment imposing the death penalty.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Edwin M. Speas, Jr. and Associate Attorney Elizabeth C. Bunting, for the State.

J. H. Barrington, Jr., attorney for defendant appellant.

BRANCH, Justice.

Defendant, by his first assignment of error, challenges the imposition of the death penalty on two grounds. He first argues that the death penalty cannot be imposed because the evidence discloses neither an intent to rob or murder deceased nor any overt act on his part from which such an intent can be inferred. We disagree.

"Any murder . . . which shall be committed in the perpetration or attempt to perpetrate any . . . robbery . . . shall be deemed to be murder in the first degree and shall be punished with death." G.S. 14-17. It is not necessary to support a conviction of felony-murder that defendant actually inflicted the fatal shot. In this jurisdiction, it is well settled that when several persons aid and abet each other in an attempt to perpetrate a robbery, and while so engaged, one of them fatally wounds the victim, all being present, each is guilty of murder in the first degree. *See State* v. *Fox,* 277 N.C. 1, 175 S.E.2d 561; *State* v. *Kelly,* 216 N.C. 627, 6 S.E.2d 533.

The State offered evidence tending to show that: (1) Defendant gained entrance to the Hunt home by making false representations, (2) he attempted to incapacitate Mrs. Hunt by the use of tear gas at the time Larry Clark was engaged in an attempt to rob her husband, (3) he assisted Larry Clark in his attempt to rob Mr. Hunt by spraying Mr. Hunt with tear gas, (4) before fleeing the premises, defendant twice asked Larry Clark if he had obtained Mr. Hunt's pocketbook, (5) defendant concealed himself in a nearby wooded area until he was discovered and taken into custody by police officers two days after

the killing. In our opinion, this evidence was sufficient to raise reasonable inferences which would support jury conclusions that defendant shared in the criminal intent to rob Mr. Hunt and that he, by overt acts, took part in the attempted armed robbery of Hudler Hunt.

Secondly, defendant contends by this assignment of error that the imposition of the death penalty in a felony-murder case is cruel and unusual punishment prohibited by the United States and North Carolina Constitutions. In the recent case of *State* v. *Woodson,* 287 N.C. 578, 215 S.E.2d 607, Chief Justice Sharp, quoting from *State* v. *Fox, supra,* stated:

> "When a murder is 'committed in the perpetration or attempt to perpetrate any . . . robbery, burglary or other felony,' G.S. 14-17 declares it murder in the first degree. In those instances the law presumes premeditation and deliberation, and the State is not put to further proof of either. . . . Furthermore, when a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree." . . .

The authorities cited by defendant do not persuade us that we should abandon the holdings in *Woodson* and the long line of cases which support it.

This assignment of error is overruled.

Defendant by his Assignment of Error No. 2 contends that the trial judge erred in overruling his objections to leading questions. The exceptions upon which this portion of this assignment of error is based relate to the following:

> Q. Was your husband in the habit of carrying lots of cash on him or not, Mrs. Hunt?
>
> Mr. High: Object.

The Court: Overruled.
The Witness: Yes.
Q. (By Mr. Britt): About how much cash did he normally carry?
Mr. Harrington: Object.
The Court: Overruled.
Q. (By Mr. Britt): Go ahead.
A. About six or seven thousand dollars.
This constitutes defendant's exception number 18 (R p .....)

• • •

Q. (By Mr. Britt): Did he or not carry that kind of money in public, Mrs. Hunt?
A. Had it in his pocketbook.
The Court: His pocket book?
The Witness: Yes, sir.
Q. (By Mr. Britt): And where was his pocketbook?
A. In his pocket, left rear pocket.
This constitutes defendant's exception number 19 (R p .....)

In 1 Stansbury's North Carolina Evidence § 31, at 83 (Brandis Rev. 1973), we find the following:

> . . . A leading question is a question that suggests the answer desired, and frequently a question that may be answered by "yes" or "no" is regarded as leading.

Leading questions have also been defined as those which embody a material fact which admit of an answer a simple "yes" or "no." 81 Am.Jur.2d *Witnesses* §429, at 438. Only the first and third questions above quoted appear to be leading questions. The vice in these questions is that they embody a fact which could be answered by a simple "yes" or "no" and suggest to the witness the answer desired. Even so, it is well established in this jurisdiction that whether counsel may ask a leading question is a matter within the discretion of the trial judge and his ruling

thereon will not be disturbed on appeal absent a showing of abuse of discretion. *State* v. *Staten,* 271 N.C. 600, 157 S.E.2d 225; *State* v. *Painter,* 265 N.C. 277, 144 S.E.2d 6; *Ducker* v. *Whitson,* 112 N.C. 44, 16 S.E. 854; 81 Am.Jur.2d *Witnesses* § 430, at 438, 439. We find no abuse of discretion in Judge Godwin's rulings.

By this assignment of error, defendant also contends that the trial judge erred by overruling counsel's objection and motion to strike hearsay testimony. During her testimony, the witness Mrs. Hudler Hunt testified that she obtained her rifle and fired sixteen times. Immediately after this testimony, the record shows the following:

> . . . Do you know whether or not you hit anybody?
> A. I don't know it, but I heard it.
> Q. You heard it. What did you hear?
> A. I heard—
> Mr. Barrington: Object to what she heard.
> The Court: Just a moment. Say again. You heard what?
> The Witness: That I hit Peplinski.
> Mr. High: Object. Move to strike, your Honor.
> The Court: The objection is overruled. Motion denied.

> "Evidence, oral or written, is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." . . .
> Hearsay evidence, unless it falls within one of the recognized exceptions to the hearsay rule, is inadmissible.

1 Stansbury's North Carolina Evidence § 138, at 458, 460 (Brandis Rev. 1973).

The above-quoted testimony is ambiguous in that it might be interpreted to mean that the witness actually

heard the shot hit defendant. In that case, it would not come within the hearsay rule. On the other hand, the testimony could be interpreted to mean that someone told the witness that she had hit defendant. Under the latter interpretation, the evidence would clearly be hearsay. Assuming, *arguendo,* that the testimony did violate the hearsay rule, we discern little prejudice to defendant. He was positively identified as one of the men who was fleeing the scene of the attempted robbery and in whose direction Mrs. Hunt fired sixteen times. He was found within a quarter of a mile of the Hunt residence in a wooded area with three separate bullet wounds in his body. Under these circumstances, whether defendant was wounded by Mrs. Hunt or someone else would add little to the State's other evidence showing that defendant was present and aiding and abetting in an attempted armed robbery in which Hudler Hunt was fatally wounded. In our opinion, the evidence admitted by the trial judge's discretionary rulings on the leading questions and his ruling on the alleged hearsay evidence was not of such import as to raise a reasonable possibility that the evidence contributed to defendant's conviction.

Defendant's Assignment of Error No. 2 is overruled.

Defendant attacks the argument of the district attorney and the manner in which he examined the State's witness, David Earl Locklear.

During the direct examination of the witness Locklear, the following exchange took place:

> Q. Well, did you tell the officers anything about going there to rob Hudler Hunt?
> Mr. Barrington: Object.
> Mr. High: Object.
> The Court: The objection is sustained. Ladies and Gentlemen, you will not consider a question put to the witness as evidence. It is not evidence and, therefore, you will not consider it as evidence, the question that has just been put to the witness.
> Q. (By Mr. Britt): Do you remember talking to me this morning before Court?
> A. Talking to you this morning?
> Q. Yes, sir.
> A. Yes, sir.
> Q. Do you remember talking to me Sunday down here at my office for about two hours?
> A. Yes, sir.
> Q. Do you remember telling me what you were going to testify to? Sir?
> A. Yes, sir.
> Q. What did you tell me you were going to testify to?
> Mr. High: Object.
> Mr. Barrington: Object. If the Court please, it seems—
> The Court: I am assuming that your objection is based upon the proposition that in your view the District Attorney is attempting to challenge his own witness?
> Mr. High: This is a State's witness.
> The Court: I understand whose witness he is. I understand your objection and am going to try to resolve it. Read the question back, please, Mr. Storms.
> (Last question read by Reporter.)
> The Witness: I told him I—
> Mr. Barrington: Wait.
> The Court: Just a moment. Overruled. He may answer the question: "What did you tell me you were going to testify to?"
> Q. (By Mr. Britt): Go ahead.
> A. That I was coming in the courtroom and asked me what I was going to testify to, about the truth of what they had told me to say. The officers. That is, Hubert Stone, Frank Johnson and Mr. Joe Freeman Britt.

Q. Let me see if I understand you, David Earl. Are you saying that Hubert Stone sitting here—

A. That's right.

Q. —and I believe Frank Johnson—

A. Frank Johnson.

Q. —the SBI Agent was there and I was there?

A. That's right, sir.

Q. And my assistant, Mr. Martin McCall, was there?

A. That's right.

Q. And you are saying we told you to come in here and tell a lie and—

Mr. Barrington: Objection.

The Witness: Well, you—

The Court: Just a moment. I'm going to rule on the objection.

The objection to the question put is sustained. You may not answer the last question put to you by the District Attorney. You may answer the original question that he put to you, which, as I understand you have not yet answered; and the Reporter will read that question again back to you. It had to do with his question regarding what you told him you were going to testify.

Now, you wait and listen to the Reporter read the question back to you. If you don't understand it, let it be known.

(Requested question read by Reporter.)

The Court: You may answer that question.

The Witness: I was going to testify to the truth.

Mr. Britt: May I proceed, your Honor.

The Court: Yes, sir. Let me interrupt to inquire if you think that your direct examination will continue some time?

Mr. Britt: In view of the recent developments, I think not.

Mr. Barrington: Object to the comment.

The Court: Objection is sustained. You will not consider the last comment made by counsel.

This constitutes defendant's exception number 12 (R. p. .....).

Mr. Britt: If it please the Court, the State would move at this time that the Court declare David Earl Locklear a hostile witness so that the State can cross examine him about previous statements.

At this point, Judge Godwin conducted an extended *voir dire* on the question of whether the witness would be declared a hostile witness. At the conclusion of the *voir dire* hearing, David Earl Locklear returned to the witness stand and resumed his testimony before the jury at which time the following occurred:

I am the same David Earl Locklear who was on the witness stand yesterday. I have seen State's Exhibit 2 which is sealed up. In that envelope I find a seven-shot Russian revolver, which I have seen before. The last time I seen it it belonged to Larry Clark.

Q. Okay. That's what you told me on Sunday; is that correct?

Mr. High: Object.

The Court: Sustained.

Q. (By Mr. Britt): All right. Now, you made statements about this case to the officers on the day after you were arrested; haven't you?

A. No, sir.

Q. Huh?

A. No, sir.

Q. Never made a statement to Mr. Hubert Stone sitting here?

Mr. High: Object.

Mr. Barrington: Object.

The Court: Sustained.

Q. (By Mr. Britt): Did you ever make a statement, then, to Mr. Frank Johnson, sitting here?

Mr. High: Object.

Mr. Britt: What is the ruling?

The Court: The question is: Did he ever make a statement?

Mr. Britt: Yes, sir.

The Court: You may say yes or not (sic).

The Witness: No.

Q. (By Mr. Britt): You never made a statement to this officer sitting here?

Mr. Barrington: Object.

Mr. High: Object.

The Court: Sustained.

Q. (By Mr. Britt): Have you ever made a statement to me before yesterday when you were in Court, concerning this case?

Mr. Barrington: Objection.

The Court: Overruled.

The Witness: No, sir.

The Court: His answer is in.

Q. (By Mr. Britt): Let me ask you this: Are you a defendant charged with murder also in this lawsuit?

Mr. High: Object.

The Court: Sustained.

Q. (By Mr. Britt): Are you a defendant charged with conspiracy to commit armed robbery in this lawsuit?

Mr. Barrington: Object.

Mr. High: Object.

The Court: Sustained.

Mr. Britt: Take the witness.

The Court: Just a moment. Ladies and gentlemen, I have heretofore reminded you—I do so again—and you will bear in mind throughout the remainder of this trial that unanswered questions put to a witness do not constitute evidence. Evidence is the answer of a witness to a question put by counsel. Any question which has been put to this witness to which an objection was interposed and which objection was sustained, does not constitute evidence and you may not so consider it.

The record does not disclose the trial judge's ruling declaring whether the witness was a hostile witness, however, the ensuing questions and rulings before the jury indicate that the ruling was adverse to the State's position.

It is still the well-established law in this jurisdiction that a district attorney may not discredit a State's witness by

eliciting evidence that the witness had made prior statements inconsistent with or contradictory of his testimony. *State* v. *Pope,* 287 N.C. 505, 215 S.E.2d 139; *State* v. *Anderson,* 283 N.C. 218, 195 S.E.2d 561. However, the general rule is that improper conduct of counsel is cured when the trial judge sustains the adversary's objection and instructs the jury not to consider it. This general rule does not apply when the conduct is so gross and prejudicial that no curative action by the trial judge could remove its prejudicial impact from the minds of the jury. *State* v. *Britt,* 288 N.C. 699, 220 S.E.2d 283.

In *State* v. *Self,* 280 N.C. 665, 187 S.E.2d 93, the defendant was prosecuted on the charges of kidnapping, rape and crime against nature. On cross-examination, the State asked the defendant if he had not tried to gain entrance into a woman's house in another county on the pretext of seeing the house as an interested possible purchaser. The court instructed the jury not to consider the question but to strike it from their minds. Finding no prejudicial error, we stated:

> . . . We hold, however, that the court's prompt action in sustaining defendant's objection to the question and in excusing the jury and instructing the solicitor not to ask further questions along that line, coupled with the court's specific instruction to the jury not to consider the question but to strike it from their mind, was sufficient to remove any possibility of error.
>
> In *State* v. *Moore,* 276 N.C. 142, 171 S.E. 2d 453, 458 (1970), Justice Sharp quoted with approval from *State* v. *Ray,* 212 N.C. 725, 729, 194 S.E. 482, 484 (1938):
>
> > ". . . '[O]ur system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions of

> the court, and are presumed to have done so. *Wilson* v. *Mfg. Co.*, 120 N.C. 94, 26 S.E. 629.' Accord, *State* v. *Bruce*, 268 N.C. 174, 150 N.E. 2d 216; 2 Strong, N.C. Index 2d Criminal Law § 96 (1967)."

In instant case it is obvious that the district attorney was *attempting* to discredit his own witness by showing prior contradictory statements. However, the only evidence elicited by the district attorney through his ill-advised attempts to impeach his own witness was that the witness had previously stated that he was going to tell the truth when he was called to testify. We find little evidence of prejudice to defendant since the witness seemed to get the better of this exchange. Any prejudice arising from this portion of the district attorney's examination was cured by the able trial judge's prompt rulings and curative instructions.

We next turn to defendant's contention that prejudicial error resulted from the following portion of the district attorney's argument:

> Now, the facts are pretty simple in this case. Every scintilla of evidence adduced in this courtroom, in this lawsuit, was put on by the State of North Carolina. Every bit of it.
>
> * * *
>
> . . . You see, the way the case has developed, the State presenting all the evidence in this case, I find myself in a position of being sandwiched on the arguments, double teamed. . . .

G.S. 8-54, in part, provides:

> . . . In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. . . .

We have held that the effect of this statute is to prohibit the district attorney from commenting on defendant's failure to testify. *State* v. *McCall*, 286 N.C. 472, 212 S.E.2d 132; *State* v. *Monk*, 286 N.C. 509, 212 S.E.2d 125. Nevertheless we recognize that the statute does not prohibit the district attorney from making comments upon the evidence and drawing such deductions therefrom as were legitimate before the passage of the statute so long as no direct reference is made to the right of the defendant to testify and his failure to do so. This statute enhanced the rights of defendants but did not abridge the privileges of the prosecution. *State* v. *Smith*, 290 N.C. ....., ... S.E. 2d .....; *State* v. *Weddington*, 103 N.C. 364, 9 S.E. 577 (1889).

In *State* v. *Smith, supra*, the district attorney, in his argument, said "I ask you to decide the case on the evidence that you have before you and ask that you remember that it is uncontradicted." Then defendant contended that this remark was an improper remark on the defendant's failure to testify and that the failure of the trial judge to censor the argument and give curative instructions on his own motion was prejudicial error. Rejecting this contention, this Court speaking through Justice Huskins, in part stated:

> . . . Contradictions in the State's evidence, if such existed, could have been shown by the testimony of others or by cross-examination of the State's witnesses themselves. Thus the prosecution was privileged to argue that the State's evidence was uncontradicted and such argument may not be held improper as a comment upon defendant's failure to testify. . . .

See State v. *Walker*, 251 N.C. 465, 112 S.E.2d 61, *cert. denied* 364 U.S. 832, 5 L.Ed.2d 58, 81 S.Ct. 45; *State* v. *Hooker*, 145 N.C. 581, 59 S.E. 866.

We believe that jurors are men and women of sufficient intelligence and capacity to observe trial proceedings so as to know when only the State has offered evidence. The remark that the State put on all of the evidence may be just as easily interpreted to refer to the absence of testimony by witnesses other than defendant.

The district attorney's statement that "the way the case has developed, the State presenting all of the evidence, I find myself in a position of being sandwiched on the arguments" was a reference by the district attorney to the fact that the failure of defendant to offer *any* evidence gave defense counsel the last argument. Neither of these statements were *direct* references to defendant's right to testify or his failure to exercise this right.

If a district attorney improperly comments on a defendant's failure to testify, this error may be cured by a withdrawal of the remark or by a statement of the court that it was improper, followed by an instruction to the jury to disregard it. *State* v. *McCall, supra; State* v. *Monk, supra.* Here defendant did not object to this portion of the district attorney's argument or call it to the trial judge's attention so that he might have given the proper cautionary instructions. Nevertheless, in his charge to the jury, Judge Godwin fully charged that the burden was on the State to prove every element of the crime beyond a reasonable doubt and further instructed:

> The defendant has offered no evidence during the trial of this case and I mention that fact for one purpose and one alone and that is to afford me this additional opportunity to remind you that he had no obligation to do so; that the law imposes upon him no burden of proof; that he has a perfect right to decide upon the strategy of his own trial; that he has a perfect right to decide—to rely upon what he may consider to be the weakness of the State's case; that the sole burden of proof is upon the State to satisfy you

> of the truth of the charges, unaided by the defendant, and that you may not hold that against this defendant, the fact that he did not offer evidence. You may not punish any man for doing a lawful thing, a thing that he has a right to do.

Under these circumstances, we find no prejudicial error in the district attorney's references to the fact that the State offered all the evidence in this case. Neither do we find any substantial prejudice to defendant flowing from the district attorney's argument that the witness J. L. Sams, an officer whose duties included the apprehension of fugitives, knew Larry Clark. Although there seems to be some confusion as to the basis of the trial judge's instructions, he unequivocally told the jury not to consider this remark. We perceive little prejudice in this argument since it related indirectly to the character of an alleged confederate rather than the defendant. In our opinion, the cautionary instructions and the judge's charge removed any possible prejudice to defendant.

Finally, in light of the overwhelming evidence against this defendant, any errors growing out of the district attorney's arguments and examination of the witness David Earl Locklear were harmless error beyond a reasonable doubt. *Schenble* v. *Florida,* 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056; *Chapman* v. *California,* 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 324; *State* v. *Watson,* 281 N.C. 221, 188 S.E.2d 289.

We feel compelled to note that except for the trial judge's prompt rulings and cautionary instructions and the overwhelming evidence against this defendant, the district attorney's continued attempts to cross-examine his own witness could well have needlessly required a new trial.

Examination of this entire record reveals no error warranting a new trial.

No error.

STATE OF NORTH CAROLINA)
) SS.
COUNTY OF CUMBERLAND)

MICHAEL LEOPOLD PEPLINSKI,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

No. 75-CR-1275

AFFIDAVIT OF SNEED HIGH, ESQUIRE, CO-DEFENSE COUNSEL IN THE ABOVE ENTITLED CAUSE

SNEED HIGH, ESQUIRE, being first duly sworn on oath deposes and says:

1. That he was licensed to practice law in the Supreme Court of North Carolina, and all inferior State Courts, in 1941, and in June, 1975, he was a practicing attorney in the law firm of Butler, High & Baer, with offices in the First Union National Bank Building, Fayetteville, North Carolina, and he is currently so engaged.

2. That in June, 1975, he was co-counsel, together with J. H. Barrington, Jr., Esquire, representing the defendant in cause entitled "State of North Carolina, Plaintiff, v. Michael Leopold Peplinski, Defendant, No. 75-CR-1275" in the General Court of Justice—Superior Court Division, Robeson County, North Carolina, The Honorable A. Pilston Godwin, Jr., Judge Presiding. That said trial was conducted in Lumberton, Robeson County, North Carolina. That said matter was tried to a jury, and the jury returned a verdict of guilty of first degree murder. That the jury was not sequestered during said trial.

3. That the trial was conducted in a building which was constructed and formerly utilized as a Baptist Church.

The structure and physical dimensions, characteristics and composition were essentially unchanged from that of a Church.

4. That during the trial the jury, from time to time, was removed from the main room into an ante-room which they utilized for purposes of deliberation and, also, at times when the jury's presence in the so-called courtroom was excused.

5. That on one occasion, when a prosecution witness, Deputy Sheriff Hubert Stone, was called to testify, the jury was removed to the ante-room which was situated approximately 15 feet from the witness chair. Such police officer, while testifying as a prosecution witness, read, verbatim, the confession of David Earl Locklear, the alleged accomplice of MICHAEL LEOPOLD PEPLINSKI. Said confession of Locklear implicated PEPLINSKI directly in the attempted armed robbery and murder of Hudler Hunt. That during such testimony the Trial Judge admonished the witness testifying that he had "a strong voice" and "these walls are paper thin".

6. That affiant, on information and belief, states that due to the physical characteristics of the Church, being utilized as a courtroom; the loudness of the witness' voice while testifying; the proximity of the jury in the ante-room to the witness chair; and the existence of a single door between the jury and the witness, that the jury *could have* (S H) heard the testimony of such witness when he so testified and read such confession.

/s/ *Sneed High*
SNEED HIGH, ESQUIRE

Subscribed and Sworn to
before me this 26th day
of August, 1976.
/s/ *Dawn F. Carr*
Notary Public
(SEAL)